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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MARGARET PICUS, an individual; on behalf of herself and others similarly situated, Plaintiffs, v. WAL-MART STORES, INC.; *et al.* Defendants.	Case No.: CV-5-00682-PMP-LRL (ORAL ARGUMENT REQUESTED)

REPLY MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT MENU FOODS, INC. TO DISMISS THE COMPLAINT

Defendant Menu Foods, Inc. ("Menu") submits this Reply Memorandum in further support of its Motion to Dismiss the Complaint for failure to state a claim upon which relief can be granted. As explained in detail below, Plaintiff's Opposition does not establish the legal sufficiency of its claims. Relying on allegations that appear nowhere in the complaint, non-existent "admissions" by Menu, and a case construing a different state's statute, Plaintiff argues that it has sufficiently alleged a violation of the Nevada Deceptive Trade Practices Act ("DTPA"). However, plaintiff has not.[1] Effectively conceding that the sole named plaintiff here lacks standing to assert violations of the laws of states other than Nevada, plaintiff now argues that Nevada law or the law of defendants' home states can govern all claims in this purported nationwide class action. This argument also misses the mark. Plaintiff's attempts to salvage its plainly deficient fraud and unjust enrichment claims are equally unavailing. Accordingly, Menu's Motion to Dismiss pursuant to F.R.C.P. 12(b)(6) should be granted and the Complaint dismissed in its entirety.

A. COUNT I FAILS TO STATE A CLAIM UNDER THE NEVADA DTPA

Relying on a California case that construes different language in a different statute from a different state, Plaintiff argues that Count I states a valid claim under the Nevada DTPA. Plaintiff also attempts to rely upon a fractured version of the standard applied by the FTC to a determination of whether a product is "Made in USA." Neither supports Plaintiff's claim under the Nevada DTPA.

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[1] Plaintiffs cite *Stop Youth Addiction* for the inflammatory statements that "[d]efendants are cheating consumers . . ." and that "[t]his deceptive and unfair conduct is like the conduct condemned by the California Supreme Court in *Stop Youth Addiction* . . . ." (See Opp. at 1:25-28.) First, *Stop Youth Addiction* concerned California Business & Professions Code section 17200 *et seq.*, not the statute cited in Plaintiff's complaint (Cal. Civil Code. sec. 1770, which is part of the Consumer Legal Remedies Act). Second, to the extent section 17200 is relevant to Plaintiffs' claims, California voters approved Proposition 64, which superseded the *Stop Youth Addiction* case. As stated by the California Supreme Court last year in *Californians for Disability Rights v. Mervyn's Inc.*, the previous law (which was applied in *Stop Youth Addiction*) was "misused by some private attorneys who file frivolous lawsuits as a means of generating attorneys' fees without creating a corresponding public benefit." *Mervyn's*, 39 Cal. 4th at 228 (internal quotations omitted). Thus, California voters approved Proposition 64 in response to the "[f]rivilous unfair competition lawsuits [that] clog our courts [and] cost taxpayers" *Id.* (internal quotations omitted). Indeed, the Supreme Court in *Stop Youth Addiction* expressed these same concerns about misuse of California's Unfair Competition Law. *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 559, 578-79 (1998), *superseded by statute*, Cal. Bus. & Prof. Code sec. 17204 as amended by Prop. 64, *as recognized in Californians for Disability Rights v. Mervyn's Inc.*, 39 Cal. 4th 223 (2006).

The only case Plaintiff cites – *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 682 (2006) – does not support the notion that the label in question violates Nevada law. Quite the opposite. Both the statutory provision construed in *Colgan* and the facts presented there are very different from those at issue here.

First, the California law construed in *Colgan* makes it unlawful to sell merchandise with a "Made in USA" designation "when the merchandise or any article, unit or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States." 135 Cal..App. 4th at 683. The Nevada law on which plaintiff purports to base her claim contains no such language. It merely proscribes the use of "deceptive representations or designations of geographic origin." *Nev. DTPA* § 598.0915. Nor has the Nevada law ever been construed by Nevada courts. Giving the Nevada statute its plain, common-sense meaning, it cannot be concluded that the existence of a single imported ingredient in a product undeniably manufactured in the United States renders the "Made in USA" designation deceptive. The Nevada law simply is not capable of such a broad-brush construction. It is also clear that its proscriptions are not coextensive with those of the more detailed California law construed in *Colgan.*

Moreover, it bears emphasis here that the undisputed facts in *Colgan* differ markedly from those alleged in this case. Here, plaintiff has alleged that the presence of a single imported ingredient in pet food entirely manufactured in the United States renders the "Made in USA" label false and deceptive. By contrast, *Colgan* involved hand tools in which important components were admittedly manufactured overseas. *Colgan* addressed the issue of whether those hand tools could properly be labeled "Made in USA" where: (1) other significant work on the components was performed in the United States; and (2) a substantial number or majority of the parts are made in the United States. The U.S. Court of Appeals for the Ninth Circuit affirmed the trial court's conclusion that the label violated the California statute which explicitly prohibits use of "Made in USA" designations when "any article, unit or part" of a product "has been entirely or substantially made, manufactured, or produced outside of the United States." 135 Cal. App. 4th at 692.

In so holding, the Ninth Circuit concluded that a reasonable consumer of products with a "Made in USA" representation "would not expect foreign manufacturing of a significant portion of the various parts of the products." Id. at 682-83. Plaintiff attempts unsuccessfully to use this finding to her advantage in this case by arguing that Menu "admits" that a "key manufactured component of Wheat Gluten was wholly Made in China, but argues that the designation was not deceptive because the product was bagged in the United States." Opp. at 10. In fact, however, plaintiff neither alleged that wheat gluten is a "key manufactured component" of the pet food at issue, nor did Menu admit such a thing. Plaintiff also did not allege, and Menu did not admit, that the pet food in question was merely "bagged" in the United States. Nor could it. Exhibit A unequivocally establishes that the pet food is manufactured in the United States.

Plaintiff's argument appears to be a tactical one designed to indirectly shore up the inadequacies of the allegations in the complaint. However, the sufficiency of plaintiff's claim must be judged by reference to the allegations in the complaint, which consist almost entirely of conclusory labels. For example, the complaint alleges that the pet food was "manufactured either in whole or in part in China." (¶ 5). The complaint also alleges that the pet food was "[c]omprised of components that were manufactured outside of the United States, including but not limited to China." (¶ 9).

The above allegations, however, cannot survive a motion to dismiss in the face of Exhibit A, the recall notice, which explicitly states that Menu's pet food was manufactured in the United States. Beyond the above conclusory and wholly baseless allegations, the complaint alleges only that the pet food in question contains a single imported ingredient. The complaint does not even allege that wheat gluten is a "key," "significant," or "substantial" ingredient. It merely alleges that wheat gluten is an ingredient in the finished product. Assuming the truth of this allegation, it simply cannot be concluded that its presence in pet food wholly manufactured in this country renders the "Made in USA" label false and deceptive.

Plaintiff also attempts to use the standards adopted by the Federal Trade Commission ("FTC") for "Made in USA" designations to support its arguments. Given that the Nevada DTPA has not been interpreted by Nevada courts, it is far from clear that the FTC standard would be adopted in Nevada. Even if it were, however, that standard does not support plaintiff's position. The applicable regulations explain that, as a threshold matter, for a product to the considered "all of virtually all" made in the USA, the final assembly or processing must take place in the United States. 62 Fed. Reg. 63,768 (Dec. 2, 1997). Menu's pet food unquestionably meets this standard, and plaintiff has alleged no facts whatsoever that might justify extending the inquiry beyond the threshold.

In sum, plaintiff cannot in good faith allege that Menu's pet food is ***not*** made in the United States. Exhibit A, which this Court may accept as true for purposes of this Motion, forecloses any such allegation. The mere allegation that a single ingredient of the finished product – wheat gluten – comes from China, without more, is insufficient as a matter of law to state a claim under the Nevada DTPA.

B. PLAINTIFF LACKS STANDING TO ASSERT CLAIMS UNDER THE LAWS OF OTHER STATES AND NEVADA LAW CANNOT APPLY TO CLAIMS OF NONRESIDENTS

Menu's Motion to Dismiss argued that the sole named plaintiff in this purported "nationwide" class action lacks standing to assert claims under the laws of other states. A class action plaintiff cannot obtain standing merely by purporting to represent a class of unspecified individuals who may themselves have standing to assert claims in other states. As the United States Supreme Court famously declared: "Standing cannot be acquired through the back door of a class action." *Allee v. Medrano,* 416 U.S. 802, 828-29 (1974)

Plaintiff effectively conceded Menu's standing arguments by failing to respond to them in any way. Instead, plaintiff now argues that: 1) because there is no conflict in the deceptive trade practices laws of the fifty states, Nevada law can be applied to all claims of the entire "nationwide" class; or 2) the law of defendants' forum states can be applied to all claims. Neither argument can salvage plaintiff's fatally flawed complaint. As explained below, state deceptive trade practices laws are not uniform. Moreover, neither Nevada law nor the law of defendants' forum states properly can be applied to plaintiff's purported claims, and this plaintiff lacks standing to assert such claims in any event.

1. Nevada Law Cannot Apply To The Claims of Nonresidents

Plaintiff asserts that "[a]fter careful analysis of the state consumer protection laws, Plaintiff determined that there is no true conflict of laws between the various states with respect to Defendants' liability for fraudulently mislabeling and selling the products as "made in the USA." Opp. at 12. In fact, however, there are significant differences in state deceptive trade practices laws. These conflicts are readily apparent even in the laws of the states cited as examples in the complaint. For example, sales of the subject product outside of California are not covered under section 17533.7 of the California Business and Professions Code. Plaintiff's claim may be entirely barred under California law since there is no evidence that Plaintiff notified Defendants or made a demand that Defendants replace or otherwise rectify the goods. Cal. Civ. Code § 1782(a). Arkansas does not allow deceptive trade practices claims which are subject to compliance with any FTC rule, order, or practice. Ark. Stat. Ann. § 4-88-101. Alabama treats the remedies available under the deceptive trade practices act and the common law and other statutory remedies as being mutually exclusive. Code of Ala. § 8-9-15.

There are other differences as well. Some states' deceptive trade practices acts require reliance while others do not. *In re Stucco Litigation*, 175 F.R.D. 210, 217 (E.D.N.C. 1997) (discussing the differences between the deceptive trade practices acts of various states). Canvassing some of the differences in the deceptive trade practices acts of the various states, the court in *In re Stucco Litigation* noted:

> Some states prohibit unfair and deceptive trade practices generally. *See, e.g.*, Conn. Gen.Stat. § 42-110b(a) (1997) ("[n]o person shall engage in ... unfair or deceptive acts or practices in the conduct of any trade or commerce"). Other states' statutes provide a list of prohibited practices. *See, e.g.*, Pa. Stat. Ann. tit. 73 § 201-2(4) (West 1996) (" 'unfair or deceptive acts or practices' mean [s] any one or more of the following...."). Some statutes require that the act be done knowingly. *See, e.g.*, Utah Code Ann. § 13-11-4 (1996)("[A] supplier commits a deceptive act or practice if the supplier knowingly or intentionally...."). Others do not. *See, e.g.*, Conn. Gen.Stat. § 42-110b(a). *Id.*

In sum, there are true conflicts between the deceptive trade practices acts of the various states and application of Nevada law to all claims is constitutional only if Nevada has "significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests, in order to ensure that the choice of [Nevada] law is not arbitrary or unfair." *Phillips Petroleum v. Shutts*, 472 U.S. 797, 821-22 (1985). That standard cannot be met here.

2. Application of Nevada Law Would Be Arbitrary and Unfair

The parties' expectations are an important element in considering whether application of a state's law is "fair." *Id.* at 822. Class members who reside or who purchased the subject products outside of Nevada did not expect, at the time they purchased the subject products, that Nevada law would apply to the transaction. Further, the state where the purchase was made or where the class members reside would have a greater interest than Nevada in protecting its residents or ensuring that transactions that occur within its borders are properly redressable under that state's laws. The only interest that Nevada has in this suit comes from class members who, like the named class member, purchased the subject products in Nevada or who reside in Nevada. Nevada does not have an interest in claims of class members who: (1) reside outside of Nevada; or (2) purchased the subject products outside of Nevada.

Therefore, given Nevada's lack of "interest" in claims unrelated to Nevada, and the substantive conflicts in laws between the various jurisdictions, application of Nevada law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.

3. Application of Defendants' Forum State Law Is Also Improper

Plaintiff's argument that the "law of the Defendants' forum state can be applied to claims of all of the absent class members" (Opp at 13) should be rejected for the same reasons. Plaintiff alleges that because the subject products were distributed from Arkansas and purchased by consumers from an Arkansas company (Wal-Mart) Arkansas law could be found to have a nexus to all of the claims in this case and that the "same is true with respect to California (Del Monte), Alabama (Sunshine Mills), Nevada (Chemnutra), and Delaware (Wal-Mart, Menu Foods Sunshine Mills, Del Monte and Chemnutra)." Opp. at 13. The law requires more than a "nexus." For a state's substantive law to be selected in a constitutionally permissible manner, that state must have a "significant contact or a significant aggregation of contacts,"creating state interests, such that the choice of its laws is neither arbitrary nor fundamentally unfair. 472 U.S. at 821-22.

In *Phillips*, the court rejected a Kansas court's application of Kansas law to the contract claims of all members of a putative nationwide class, the majority of whom had no independent connection to the Kansas forum. *Id.* at 823. The Court accepted that Kansas, by virtue of defendant's ownership of property and conduct of business in that state, had contacts with or a nexus to the litigation. *Id.* at 819-820. Nevertheless, because Kansas lacked a "'significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class, and substantive conflicts existed between

Kansas and other plaintiff jurisdictions, universal application of Kansas' legal standards would frustrate the reasonable expectations of the parties and invade the lawful province of other states. *Id.* at 822.

In the products liability case, *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360 (D. La. 1997), the court rejected the plaintiff's argument that "application of Michigan law to all claims in this litigation will not offend notions of due process or the Full Faith and Credit clause of the Constitution because Ford has its principal place of business in Michigan and design decisions concerning the Bronco II were made in Michigan." *Id.* at 371. The court noted that:

> constitutional restraints must also be considered before invoking choice of law principles to apply the law of a single state to the claims of citizens of fifty-one (51) United States jurisdictions, who purchased their vehicles in fifty-one different jurisdictions, involving vehicles that were manufactured in Kentucky that had an alleged defect manifested [sic] itself in fifty-one United States jurisdictions." *Id.*

The court was not convinced that application of Michigan law to the claims of the putative class members was appropriate: "Plaintiffs ... summarily characterize Michigan's contacts to this litigation as 'overwhelming,' without explaining how Michigan's contacts are more significant than the contacts of the state in which the Bronco IIs were manufactured, where the alleged defect manifested itself, where plaintiffs' purchased their vehicles, where plaintiffs' entered the complained-of transactions, and/or where the allegedly fraudulent conduct occurred." *Id.*

Like *Phillips* and *Ford*, the plaintiff in this case cannot show that the Defendants' forum states have a significant contact or aggregation of contacts that creates state interest. Plaintiff has not shown nor can Plaintiff establish, that the Defendants' forum states have more significant contacts or a greater aggregation of contacts than the contacts of the state in which the subject products were manufactured, where the plaintiff purchased the subject product, or where the class members reside. Accordingly, given Defendants' forum states' lack of "interest" in claims arising in other states, and the substantive conflicts in state laws, application of Defendants' forum states law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.

C. CHOICE OF LAW ISSUES ARE NOT PREMATURE BECAUSE THE COURT MUST DETERMINE WHAT LAW APPLIES TO PLAINTIFFS' CLAIMS BEFORE IT CAN EVALUATE WHETHER STANDING IS MET AND WHETHER PLAINTIFFS' COMPLAINT STATES A VALID CAUSE OF ACTION

Plaintiff argues that "choice of law analysis for a nationwide class action and a determination of its potential impact on the manageability of a class action is premature at the pleadings stage." Opp. at 14. However, Menu is not using the choice of law issue to illustrate the lack of manageability of the class action. Instead, the choice of law analysis is necessary at this juncture to determine whether plaintiff has standing and whether the complaint states a valid cause of action. Both of these issues require reference to a state's substantive law; the court cannot evaluate whether plaintiff has standing or whether plaintiff's complaint should be dismissed for failing to state a claim unless it references some state's law. *See John v. Budget Rent a Car Sys.*, No. 06-61815-CIV-COHN/SNOW, 2007 U.S. Dist. LEXIS 51492, at *5 (S.D. Fla. July 16, 2007) (stating that "[a]s a threshold matter, the Court must determine what law applies to Plaintiffs' claims before it can evaluate whether Plaintiffs' Complaint states a valid cause of action").

John involved a purported class action brought by two named plaintiffs who rented vehicles in Florida and North Carolina and who claimed that Budget's practice of charging $3.00 per vehicle as a "cost recovery fee" violated the "New Jersey Consumer Fraud Act, the Florida Deceptive and Unfair Trade Practices Act, the North Carolina Unfair and Deceptive Trade Practices Act, and substantially similar consumer fraud laws in certain other states." *John*, 2007 U.S. Dist. LEXIS 51492, at *2. The court granted defendant's motion to dismiss and rejected plaintiffs' argument that the choice of law issue is premature at the motion to dismiss stage and that the court should defer ruling on this issue until the class certification hearing because:

> the choice of law issue presented at this time is simply whether the Court should apply the law of the state in which Budget is headquartered to all members of the class, or apply the law of each state in which the class members rented the vehicles at individual Budget rental facilities. No additional evidence is necessary to answer this choice of law question, so additional discovery will not be of assistance to the parties. Furthermore, the resolution of the instant Motion to Dismiss depends upon the Court first determining this fundamental choice of law question. Therefore, the Court addresses it at this time. *Id.* at *5.

The court found that the state in which each plaintiff rented a vehicle, rather than the law of New Jersey, the state in which Budget is headquartered, applied to the action because Budget made, and Plaintiffs received, the alleged misrepresentations at each individual Budget rental center when Plaintiffs rented the vehicles; plaintiffs acted in reliance upon the alleged misrepresentations in those states; Plaintiffs are domiciled in those states; the place where the tangible thing which is the subject of the transaction--the rental vehicle--is located, for each rental, is the state in which it was rented; and plaintiffs were each to render performance under the rental contract in the states in which they rented the vehicles. *Id.* at *7-8. "Although Defendant Budget is headquartered in New Jersey, this one factor alone cannot overcome the weight of the other factors." *Id.* at *8. The court dismissed the claims arising under "substantially similar consumer fraud laws of other states" because of the choice of law determination:

"[T]he substantially similar consumer fraud laws of other states are not applicable to the claims of [the two named plaintiffs]". *Id.* at *18.

In another case, *Lantz v. Am. Honda Motor Co.*, No. 06 C 5932, 2007 U.S. Dist. LEXIS 34948 (N.D. Ill. May 14, 2007), the court addressed "Plaintiffs' assertion that it is premature [at the motion to dismiss stage] to consider the choice-of-law issue prior to class certification." *Id.* at *10-12. The court found that relevant caselaw did not require "the court delay a choice-of-law analysis to the time of class certification. Indeed, [these] cases undermine the theory that a nationwide California class will be appropriate at all" given that the courts in these cases "rejected nationwide class certifications where the district court adopted one state's consumer protection law without conducting a proper choice-of-law analysis." *Id.* at *11-12 (discussing *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308 (5th Cir. 2000) and *In re St. Jude Med., Inc. Silzone Heart Valve Prod. Liab. Litig.*, 425 F.3d 1116 (8th Cir. 2005)).

As the above cases demonstrate, choice of law analysis is not premature at this stage. In fact, it is critical to the determination of standing, as well as to determination of whether plaintiff has stated a valid claim for relief. As set forth in Menu's opening Memorandum, plaintiff cannot use the device of a purported nationwide class action to obtain standing to assert claims under the laws of states other than Nevada. Plaintiff has cited no contrary authority.

D. COUNT II FAILS TO SATISFY EVEN THE RELAXED PLEADING STANDARD UNDER F.R.C.P. 9(b)

Plaintiff argues that the sufficiency of its fraud allegations against Menu should not be subject to the requirements of F.R.C.P. 9(b), but should be evaluated under a "relaxed" standard because the underlying facts are peculiarly within defendants' knowledge. Plaintiff cites *Rocker v. KPMG*, 148 P. 3d 703 (2004) in support of this proposition. However, plaintiff neglects to mention that portion of *Rocker* which cautious that:

> Where pleading is permitted on information and belief, a complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard. Id.

The court also observed that, "when applying this relaxed standard, the federal courts require the plaintiff to allege more than suspicious circumstances." Id.

The Complaint utterly fails to satisfy even the relaxed pleading standard for fraud. It does not adduce specific facts supporting a strong inference of fraud. Nor does it even allege "suspicious circumstances." Indeed, the allegations of "fraud" in the Complaint are fully consistent with Menu's good faith belief that products manufactured in the United States properly can be labeled as "Made in USA". There are no facts whatsoever to support a "strong inference of fraud" or "suspicious circumstances." Accordingly, Count II of the Complaint must be dismissed for failure to adequately allege fraud – even under a relaxed pleading standard.

E. COUNT II FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT

Plaintiff argues that it has stated a cause of action for unjust enrichment – notwithstanding the voluntary recall referenced in the Complaint – because the recall did not cover every can of pet food with the "Made in USA" label.

However, even if plaintiff's claims are more extensive than the recall, and Menu does not concede that they are, the unjust enrichment claim must be dismissed. As plaintiff notes in her opposition, a claim for unjust enrichment under Nevada law requires plaintiff to allege and prove "the unjust retention of a benefit to the loss of another." As set forth in Section A, above, though, plaintiff has failed to state a claim under Nevada's deceptive trade practices laws. Absent a valid claim that the "Made in USA" label was deceptive under Nevada law, plaintiff cannot establish any "unjust retention of a benefit" or any loss. Accordingly, the claim for unjust enrichment must be dismissed.

Even if this Court were to conclude that plaintiff has adequately alleged a cause of action under the Nevada's DTPA – and it should not – the unjust enrichment claim would fail for a different reason. Another essential element of an unjust enrichment claim is the absence of an adequate remedy at law. A cause of action under the Nevada DTPA constitutes an adequate remedy at law.

Accordingly Count III of the Complaint must be dismissed.

CONCLUSION

For the reasons set forth above, as well as those included in Menu's opening Memorandum of Points and Authorities, the Complaint fails to state a claims for which relief may be granted and must be dismissed in its entirety.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 26 day of July, 2007, a true and correct copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT MENU FOODS, INC. TO DISMISS THE COMPLAINT was served as follows:

(X) by placing same to be deposited for mailing in the U.S. Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, NV; and/or

( ) to be hand-delivered to the attorneys listed below at the address indicated below:

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